

After reviewing the record and considering the arguments of the parties, the Appeals Board agrees that the Award should be reduced from sixty-three percent (63%) permanent partial disability to fifty percent (50%) permanent partial general disability.

Claimant suffered bilateral upper extremity injuries from her work for respondent during the period of July 1990 through May 28, 1991, including bilateral carpal tunnel. Dr. Melhorn treated claimant's injuries and performed carpal tunnel release on the right in May 1991 and release on the left in June 1991.

At the time of her injuries claimant worked as a stock controller. Her work included stapling bags and tearing off masking tape. After Dr. Melhorn performed claimant's carpal tunnel release surgery, he released her to return to work for respondent with restrictions. Claimant returned to work but continued to have problems. She testified that the stapling continued to bother her and she had numbness and aching in both arms. In December 1991 Dr. Melhorn did additional surgery on claimant's right thumb. He released her again to return to work on January 28, 1992. Claimant continued to perform in her regular duties but underwent a hernia repair in January 1993. Following the hernia surgery, she attempted to return to work in August 1993 but was advised at that time that her employer could not accommodate her work restrictions. The restrictions were the same as those she had when she worked, with difficulty, prior to the hernia surgery.

Respondent has argued that claimant's award should be limited to functional impairment because, according to respondent, claimant could have returned to work at a comparable wage. On review of the record the Appeals Board finds more probably than not claimant could not have returned. She testified that the respondent told her they would not accommodate the restrictions. Respondent has produced the testimony of Mr. Hiatt suggesting his belief they could have. However, he does not testify that a job offer was made, only that upon his initial review he thought accommodation might be possible. He referred her to others for that decision and was not certain of the outcome. The individual to whom claimant was referred, Sarah Lloyd, did not testify. In addition to claimant's own belief that she could not continue to perform the duties, the evidence indicates the respondent probably or most likely would not have been willing to allow her to return.

Because claimant was not able to return to work at a comparable wage, she is entitled to benefits based upon a work disability in excess of the functional impairment if the evidence otherwise establishes such a work disability.

However, for the period claimant continued to work for respondent at a comparable wage, i.e., through January 6, 1993, respondent is entitled to benefit of the presumption of no work disability in K.S.A. 1990 Supp. 44-510e. For this period, 79.29 weeks, the Appeals Board finds claimant to be entitled to benefits for a twenty-four percent (24%) permanent partial functional disability. This finding is based upon Dr. Schlachter's rating, used because it includes the shoulders. In this case, Drs. Melhorn, Lucas and Schlachter testified regarding claimant's work restrictions. From the testimony of those doctors, Jerry Hardin and Karen Terrill testified regarding the affect of claimant's injury on her ability to earn a comparable wage and engage in work in the open labor market. Respondent asserts the Special Administrative Law Judge made several errors in determining the extent of loss of access to the labor market and loss of ability to earn comparable wage as required by K.S.A. 1990 Supp. 44-510e.

Respondent first asserts that the Special Administrative Law Judge did not properly account for work restrictions claimant had prior to the injury at issue in this case. Specifically, respondent asserts that the Special Administrative Law Judge improperly interpreted the opinions of Mr. Jerry D. Hardin. The Special Administrative Law Judge states in his opinion that Mr. Hardin did take to account claimant's prior restrictions. In fact, Mr. Hardin's testimony indicates that he did not take into account prior restrictions and the Appeals Board so finds.

Claimant argues, on the other hand, that the record does not support respondent's contention that claimant had prior work restrictions. Claimant's counsel asserts that claimant worked outside those restrictions and accordingly the restrictions should not affect the assessment of work disability in this case.

The Appeals Board concludes, principally from the testimony of Dr. McClanahan, that claimant did have work restrictions prior to the injury in this case. Dr. McClanahan had treated claimant for neck and upper back injuries in 1987. He indicates that her history includes a laminectomy and discectomy in 1983. Claimant related to him a thirty-five (35) pound weight-lifting restriction. Dr. McClanahan testified that in his opinion that restriction was a reasonable one given claimant's prior injuries and surgery. Dr. McClanahan treated claimant again in 1990 after she had fallen and injured her coccyx. He believed then that the weight-lifting restriction was reasonable.

While the Appeals Board concludes claimant would have work restrictions from the laminectomy, the Appeals Board does not agree that they are as limiting as the thirty-five (35) pound weight limit would suggest. Both Karen Terrill and Jerry Hardin testified that claimant's work for Cessna involved work in the medium category. The Appeals Board, therefore, agrees with claimant's assertion that she worked outside the restrictions. The Appeals Board concludes claimant's preinjury labor market should be determined to include the medium category of jobs as defined by the Dictionary of Occupational Titles.

Karen Terrill's initial opinions assumed claimant's preinjury work restriction of thirty-five (35) pounds. It also assumes some additional restrictions for limited repetitive back movements and prolonged sitting. Using those restrictions to define claimant's preinjury labor market, Ms. Terrill concludes claimant has a twenty-nine percent (29%) loss of access to the labor market based upon Dr. Melhorn's restrictions and a thirty-one percent (31%) loss of access to the labor market based upon Dr. Schlachter's restrictions. When asked to give opinions which start from the assumption that the claimant could work in the full range of medium category jobs, Ms. Terrill adjusted her opinions to state that Dr. Melhorn's restrictions would result in a thirty-five to forty percent (35-40%) loss of access and Dr. Schlachter's a forty-five to fifty percent (45-50%). She emphasized that these are opinions stating her ball park range of percentage loss.

Mr. Hardin, on the other hand, does not give specific opinions which assume a limited preinjury labor market. He testifies that his preinjury labor market included heavy and very heavy. He understood from the claimant that her preinjury work restrictions were temporary only. When examined about the effect of preinjury work restrictions, he testified that there would be some but only a small reduction in the loss of access to the labor market due to the limited number of jobs in the heavy and very heavy categories. He does not, however, state specifically what his adjusted opinions would be. The Appeals Board is not willing to speculate what the specific adjustment would be. Accordingly, the Appeals Board finds the most reasonable evaluation of claimant's impairment found in the record

is that stated by Ms. Karen Terrill based upon assumptions that claimant's preinjury labor market was limited to medium, light and sedentary work.

The Appeals Board also finds it more reasonable in this case to rely upon the restrictions recommended by Dr. Schlachter. Dr. Schlachter's opinion includes evaluation and determination that claimant suffers some permanent injury in her shoulders. The Appeals Board finds that conclusion more credible in light of claimant's testimony to injury in her shoulders and in light of the complaints reflected in Dr. Melhorn's records. Although Dr. Melhorn has not assessed a permanent impairment to the shoulders, his records do reflect complaint to both shoulders over an extended period of time. Accordingly, the Appeals Board adopts Ms. Terrill's opinion, based upon a preinjury labor market limited to medium and lighter work which uses Dr. Schlachter's restrictions to conclude that claimant has a forty-five to fifty percent (45-50%) loss of access to the open labor market.

The Appeals Board also agrees that the Special Administrative Law Judge has overlooked certain portions of the record in determining loss of ability to earn comparable wage. The Special Administrative Law Judge suggests that Ms. Terrill gave no opinion regarding loss of ability to earn a comparable wage. It is true she does state her ultimate conclusion that claimant suffered no loss because, at the time she saw her, claimant was working at Cessna at a comparable wage. Ms. Terrill does, however, express her opinion that if claimant were not working at Cessna she would likely be able to earn between \$8 and \$10 an hour. She also expresses opinions, apparently based upon calculations done at the time of deposition, the claimant would have a thirty-one to forty-five percent (31-45%) loss of ability to earn comparable wage because of the \$8 to \$10 an hour compared to claimant's preinjury wage.

The parties have stipulated in this case that claimant's preinjury base wage was \$528.00 per week based upon regular time, plus a \$16.37 average overtime, for a total of \$544.37 per week. The parties have also stipulated the value of certain health insurance benefits provided was \$51.42. The Special Administrative Law Judge, therefore, used \$544.37 as claimant's average weekly wage until termination of her employment and then used \$595.79. In addition to eight (8) weeks of temporary total disability, there were 76.29 weeks of permanent partial disability prior to termination of employment. The wage of \$544.37 was, therefore, used through January 3, 1993 and \$595.79 thereafter. Neither party disputes this finding on appeal and the Appeals Board, therefore, adopts the finding regarding wage.

The wage loss opinions of both vocational experts require adjustment to compare the claimant's preinjury average weekly wage. Mr. Hardin testified he felt he believes claimant can earn \$200.00 post injury. He compared this to \$582.40. As indicated the Appeals Board considers it appropriate to compare it to \$595.79 and the result is the sixty-six percent (66%) found by the Special Administrative Law Judge. Ms. Terrill, on the other hand, has expressed her opinion claimant can earn \$320.00 to \$400.00 per week post injury. Compared to the preinjury wage of \$595.79 this results in a thirty-three to forty-six percent (33-46%) loss of ability to earn a comparable wage, with thirty-nine and one-half percent (39.5%) being the average of the two extremes in the range given by Ms. Terrill. The Appeals Board considers it appropriate in this case to give equal weight to the opinions of each expert relating to wage loss. By doing so the Appeals Board concludes claimant has a fifty-three percent (53%) loss of ability to earn a comparable wage.

The Appeals Board also considers it appropriate to give equal weight to the loss of ability to earn comparable wage and loss of access to the open labor market. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Doing so yields a fifty percent (50%) work disability which the Appeals Board finds to be claimant's work disability as a result of the injuries asserted in this claim. Claimant is, therefore, entitled to benefits based on a twenty-four percent (24%) functional impairment through January 6, 1993 and a fifty percent (50%) work disability thereafter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated September 6, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ruth A. Hardin, and against the respondent, Cessna Aircraft Company, and its insurance carrier, CIGNA, for an accidental injury which occurred by a series of accidents through May 28, 1991 and based upon an average weekly wage of \$544.37, for 8 weeks of temporary total disability compensation at the rate of \$278.00 per week or \$2,224.00 followed by 76.29 weeks at the rate of \$87.10 per week or \$6,644.86, followed by 330.71 weeks based upon an average weekly wage of \$595.79 at the rate of \$198.61 per week or \$65,682.31 for a 50% permanent partial general body work disability making a total award of \$74,551.17.

As of October 9, 1995, there is due and owing claimant 8 weeks of temporary total disability compensation at the rate of \$278.00 per week or \$2,224.00 followed by 76.29 weeks of permanent partial disability compensation at the rate of \$87.10 per week in the sum of \$6,644.86, followed by 143.57 weeks of permanent partial disability at the rate of \$198.61 per week in the sum of \$28,514.44 for a total of \$37,383.30 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$37,167.87 is to be paid for 187.14 weeks at the rate of \$198.61 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and costs are to be borne one-half by the respondent and one-half by the Kansas Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed 50% to the respondent and 50% to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey
Special Administrative Law Judge

\$150.00

Barber & Associates	
Transcript of Regular Hearing	\$270.60
Kelley, York & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$225.70
Deposition of Ruth A. Hardin	\$150.90
Deposition of Jerry D. Hardin	\$302.00
Deposition Services	
Deposition of George L. Lucas, M.D.	\$189.40
Deposition of J. Mark Melhorn, M.D.	\$230.80
Deposition of Ward McClanahan, M.D.	\$142.00
Deposition of Karen Crist Terrill	\$430.20
Deposition of Jerry Hiatt	\$120.00

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tom E. Hammond, Wichita, Kansas
Douglas C. Hobbs, Wichita, Kansas
Eric R. Yost, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director